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Contribution-Wilful Tortfeasors-Common Law and Under Uniform Contribution Among Tortfeasors Act

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CONTRIBUTION—WILFUL TORTFEASORS—COMMON LAW AND UNDER UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT [1]

The problem of contribution among wilful tortfeasors is an ever present one, and has been subjected to diverse treatment at common law and under contribution statutes. Here the purpose is to focus upon the problem so that the readers may consider the advisability of permitting contribution.

There was no contribution among joint tortfeasors at common law in the United States. This rule was based, somewhat erroneously, on the decision in *Merryweather v. Nixon,* decided in 1799.[2]

In that situation *A* had brought an action on the case against *B* and *C* for injury done by them to his reversionary estate in a mill. His declaration included a count of trover for the machinery belonging to the mill. *A* obtained judgment and levied the whole amount against *B*. *B* thereupon brought suit against *C* for "contribution of a moiety, as for so much money paid to his use." A nonsuit was granted, and this was upheld on appeal.

It is said "that the ground of the decision would appear to be simply the fact that the parties had acted intentionally and in concert, and that the plaintiff's claim for contribution rested upon what was, in the eyes of the law, entirely his own deliberate wrong." [3]

The American courts, however, seized upon this case as expounding a rule that contribution would not be allowed in any instance whether the tort was wilful or merely negligent. The English courts only applied the rule to intentional torts.

The American common law rule is perhaps stated most clearly in the *Restatement of Restitution:* [4]

> "Where two persons acting independently or jointly, negligently injure a third person or his property and both become liable in tort for such injury, one tort-feasor, making expenditures in discharge of such liability, is not entitled to contribution from the other tortfeasor."

This rule of no contribution persisted in the majority of American jurisdictions until changed by statute, although there were exceptions to the rule which need not be mentioned here.

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[1] 9 U.L.A. 156.
[2] 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).
[3] PROSSER, LAW OF TORTS, p. 247 (2d Ed. 1955).
[4] RESTATEMENT, RESTITUTION § 102 (1936).

There were, however, some jurisdictions, such as Pennsylvania, which at a relatively early time permitted contribution among merely negligent tortfeasors in the absence of statute.[5]

The Pennsylvania Legislature, in 1939, passed an act (now repealed) which provided for contribution among joint tortfeasors.[6] The Superior Court said in *Fisher v. Diehl*[7] that the statute was a confirmation of the Supreme Court's decision in *Goldman v. Mitchell-Fletcher Co.,* the first appellate case allowing contribution in this state. This would seem to imply that, as of that time, contribution would be allowed except in cases where it would be inequitable, or where there had been an intentional violation of law, or where the wrongdoer knew, or was presumed to know, that his act was unlawful.[8]

Thus the situation in 1939 was that the majority of the states adhered to the common law rule allowing no contribution. In the minority states allowing contribution, it was restricted to negligent torts.

As already noted, however, there were exceptions to the common law rule. Even those states with statutes allowing contribution placed varied interpretations upon them. The National Conference of Commissioners on Uniform State Laws, attempting to bring order out of chaos, recommended the Uniform Contribution Among Tortfeasors Act.[9] This act was subsequently adopted by seven states and the Territory of Hawaii.[10] The principal sections of this act with which we are concerned are as follows:

> "Section 1. The term joint tortfeasors means two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them."
>
> "Section 2. (1) The right of contribution exists among joint tortfeasors; (2) a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro-rata share thereof."

It will be noted that the act itself makes no distinction between wilful or intentional tortfeasors, and those who are only negligent. The Commissioners,

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[5] Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928).
[6] PA. STAT. ANN., tit. 12, § 2081 (1939).
[7] 156 Pa. Super. 476, 40 A.2d 912 (1945).
[8] Fisher v. Diehl, *supra* note 7.
[9] 9 U.L.A. 156.
[10] Arkansas; ARK. STAT. ANN., c. 10, §§ 34-1001 to 34-1009 (1947).
Delaware; DEL. CODE ANN., tit. 10, §§ 6301-6308 (1953).
Hawaii: HAWAII REV. LAWS, §§ 10487-10493 (1945).
Maryland; MD. CODE ANN., art. 50, §§ 20-29 (1951).
New Mexico; N.M. STAT. ANN., tit. 12, §§ 24-1-12 to 24-1-16 (1953).
Pennsylvania; PA. STAT. ANN., tit. 12, §§ 2082-2089 (Supp. 1954).
Rhode Island; R.I. ACTS, c. 940 (1940), amended by R.I. ACTS c. 1635 (1945).
South Dakota; S.D. STAT. ANN. §§ 33.04A01-33.04A10 (Supp. 1952).

as shown by the comments to these sections, purposely omitted any distinction; the act was to apply to all joint tortfeasors.[11]

Not all of the states which have adopted the Uniform Act have had occasion to have a court interpretation placed upon the sections dealing with joint tortfeasors, and a determination of their application to wilful tortfeasors.[12]

In Pennsylvania the question has not been decided by an appellate court, but the issue was discussed in the Common Pleas Court of Crawford County in the case of *Brenneis v. Marley.*[13] Here a group of boys had committed a tort which resulted in fatal injuries to a small child. The court in the course of its opinion on a petition for leave to intervene to seek contribution from an additional defendant, gave the following interpretation of the Uniform Act in Pennsylvania.[14]

> "While it appears to us that the Superior Court is absolutely correct in saying that the decision in Goldman v. Mitchell-Fletcher Co. was confirmed by the legislature, it also seems to us that the legislature went beyond the scope of the decision as no distinction is made in the statute between wilful torts and torts arising from negligence. We are of the opinion, therefore, that both under the Act of 1939 and the Uniform Contribution Among Tortfeasors Act of 1951, which repealed the 1939 Act, the right of contribution exists among joint tortfeasor[s] whether the tort was *wilful* or negligent.[15] (Emphasis added.)

In light of the reasoning of this lower court opinion, it is not unreasonable to assume that if the appellate courts of this state were faced with the same problem they would arrive at the same conclusion. Here the court felt that since no distinction was made in the act between wilful and negligent tortfeasors, it would, therefore be applicable to both.

New Jersey, although not adopting the Uniform Act, has a contribution act which is similar to it.[16] If any distinction exists, it is that the New Jersey act is not subject to as broad an interpretation as the sections of the Uniform Act discussed above. The wording seems to restrict the coverage of this act.

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[11] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, (1939), p. 176 *et seq.*

[12] The Rhode Island courts and the Delaware courts have not beem faced with the problem of contribution in a wilful tort case. However, Hackett v. Hyson, 72 R.I. 132, 48 A.2d 353 (1946), and Distefano v. Lamborn, 46 Del. 195, 81 A.2d 675 (1951) contain excellent discussions of the acts of the respective states.

The case of Maryland Lumber Co. v. White, 205 Md. 180, 107 A.2d 73 (1954) implies that no distinction would be made in this state under the act. This was the case of a wilful tort of conversion, arising after the date of the act, and the court made no mention of the fact that it was a wilful tort in its decision.

[13] 5 D. & C. 2d 20 (1955).

[14] PA. STAT. ANN., tit. 12, §§ 2082-2089 (Supp. 1954).

[15] Mook, P.J., in Brenneis v. Marley, 5 D. & C. 2d at 24 (1955).

[16] N.J. STAT. ANN. §§ 2A:53A(1) to 2A:53A(5).

Nevertheless, when faced with questions of whether the act applied to wilful tortfeasors, the New Jersey courts answered in the affirmative.[17]

It would appear, in those states which have not adopted the Uniform Act, that the tendency is still not to allow contribution among wilful tortfeasors.[18] Dean Prosser states that while the rule denying contribution among negligent tortfeasors is "in full retreat" and will eventually be abolished by the pressure of opinion, "as to wilful wrongdoers, or those who are guilty of the most flagrant forms of misconduct, there is no indication of any desire or tendency to relax the original rule." [19]

Kentucky [20] and Virginia [21] have by statute limited the right of contribution to "a mere act of negligence" involving "no moral turpitude."

The National Conference of Commissioners, noting the lack of enthusiasm for the adoption of the Uniform Act of 1939, withdrew the act in 1954 for further study and revision. In 1955 the Commissioners proposed a substitute act.[22]

Section 1 (c) of the substitute act provides:

> "There is no right of contribution in favor of any tortfeasor who has intentionally (wilfully or wantonly) caused or contributed to the injury or wrongful death."

The Commissioners' comment on this sub-section is:

> "*Intentional, wilful and wanton* . . . The 1939 act was silent on the matter. The policy here followed is that of the original rule as to contribution, that the court will not aid an intentional wrongdoer in a cause of action which is founded on his own wrong. In cases of concerted battery, for example, there appears to be little reason to shift any part of the liability to another.
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> "Two valid reasons exist for extending the exclusion to wilful and wanton acts causing or contributing to the injury.
>
> "In the first place wilful and wanton acts seem naturally to belong in the same class with intentional wrongs and to imply moral turptitude on the part of the wrongdoer. The policy of the section as drafted adopts the law of those states which do not recognize classification of negligence into degrees.

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[17] 17 N.J. 67, 94, 110 A.2d 24 (1954) and 25 N.J. 17, 134 A.2d 761 (1957).

[18] As of 1957, some 24 states allow contribution in some form although for the most part are restricted to negligent torts.

[19] PROSSER, LAW OF TORTS § 46 (2d Ed. 1955).

[20] KY. REV. STAT. § 412.030 (1953): "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

[21] VA. CODE ANN. § 8-627 (1950): "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

[22] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, (1955), p. 216 *et seq.*

> It is intended to convey the idea that there is a difference between negligence and wilful or wanton misconduct.
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> "In the second place, by excluding wilful and wanton actors from the right of contribution, we eliminate most of the arguments urged for a rule allocating the shares of liability on the basis of the relative degrees of fault.
>
> "In many states 'gross and wanton negligence' in guest statutes is construed to mean wilful and wanton conduct. This is the rule which should be applied in determining the right of contribution under this act."

It will be noted that the Commissioners seek to exclude from the benefits of the act not only "wilful" torts, which have been limited herein to mean "intentional," but also to exclude wilful and wanton as another degree of conduct, somewhere between intentional and negligent.

What then are the reasons for denying contribution to intentional wrongdoers at common law, and under the substitute measure above, to those whose acts are classified as wilful and wanton?

One argument is that since the doctrine is essentially equitable, it would be unconscionable to permit a wrongdoer to profit by his own wrong. This is a worthy objective, but isn't the court doing indirectly what it would not do directly, in that the one who is left to pay nothing has certainly profited by the refusal of the court to compel contribution from him? Further, it has been suggested that "the rationale of contribution is not recovery for a tort but the enforcement of an equitable duty to share the liability." [23] If such is the case, does not the duty to share the liability exist the same in the case of a wilful and wanton or intentional tort as it does in the case of a negligent tort?

Another reason given for denying contribution is that it will have a deterrent effect upon the commission of concerted, intentional torts. This of course might be true if the potential joint tortfeasors were aware of the rule and of its consequences. A rule of tort law, however, tends to be more obscure than a criminal statute, which also has as one of its aims, a deterrent effect. But even assuming that the tort rule receives the notoriety of a criminal statute it is doubtful if potential tortfeasors would reflect upon it, or that it would deter them if they did.

There is also another proposal why the Uniform Act now in effect should not apply to intentional tortfeasors. It is based on a rule of statutory construction. If a statute is in derogation of the common law, as the Uniform Act is in most jurisdictions, it is to be strictly construed. Thus, according to this argument, since intentional tortfeasors are not mentioned in the act they were meant to be excluded from it. As Justice Heher said in the first appeal of *Judson v. Peoples Bank & Trust Co.;*

[23] Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955).

"It would seem that a rule of policy sustained by experience from early times is not to be abrogated in favor of contribution between those who knowingly and wilfully do grievous injury to a person or property in the pursuit of a conspiratorial design, unless the legislative intent to that end be expressed in clear and indubitable terms." [24]

A leading work, however, on statutory construction has this to say about the rule:

"Modern legislatures and judges have come to recognize however, that the ancient doctrines disfavoring changes in existing law are founded on archaic premises. Statutes, usually, are enacted with the intent to change existing law—either statutory or common law . . . .

"General interpretative provisions, too, have been enacted in many states abolishing the rule that statutes in derogation of the common law should be strictly construed, and the procedure has become very common to include express interpretative provisions in the separate acts commanding a liberal construction of the law with the view to accomplishing its objectives." [25]

There is one other ground for opposition to the allowance of contribution among joint tortfeasors. The reasoning of this argument applies to contribution in general. The rationale of the proposal is that in a case where an insured defendant seeks contribution from an uninsured "co-tort-feasor," an efficient loss distributor, the subrogated insurance company, shifts part of the damages to a non-distributor, which is undesirable from the "social policy point of view." [26] The obvious answer is that under the modern trend, one person is as likely to be insured as another. Moreover, an uninsured defendant is usually financially unable to respond to a suit for contribution. In many cases the insurance carrier would have only an unexecutable judgment. Thus, from a practical standpoint there would be little advantage to the insurance carrier to seek contribution, and consequently the loss would not be shifted to a non-distributor.

As a final thought, doesn't the substitute measure proposed by the Conference of Commissioners go beyond even the rule of *Merryweather v. Nixon?* If those states which have adopted the Uniform Act and allowed contribution among all tortfeasors, were now to adopt the substitute measure, would it not be a complete reversal of all advance that has been made in this field of law? Wouldn't it be a reinstatement of antiquated ideas which have no sound foundation in the present? It is appropriate to point out here that the rule of the *Merryweather* case was abolished in the country of its origin in 1935 by the Law Reform (Married Women and Tortfeasors) Act.[27]

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[24] 17 N.J. 67, 94, 110 A.2d 24 (1954).
[25] SUTHERLAND, STATUTORY CONSTRUCTION § 5502 (3d Ed. 1943).
[26] HARPER AND JAMES, THE LAW OF TORTS p. 717 (1956).
[27] 25 & 26 Geo. V, c. 30, s. 6 (1935).